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No. 74-1406

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM EDWARD ALRED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was prejudiced by a fifteen-month delay in returning the indictment and that the district court erred in refusing to permit him to ask government agents the reasons for their failure to arrest him prior to the return of the indictment.

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on one count of conspiracy willfully to receive, conceal, transport, and dispose of stolen explosive materials, in violation of 18 U.S.C. 842(h) (Count 1), and one count of carrying a firearm unlawfully during the commission of a felony, in violation of 18 U.S.C. 924(c) (Count 2).[1] Petitioner was sentenced to three years'

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[1]Petitioner's co-defendant, James Eugene Brock, pleaded guilty to both counts of the indictment and co-defendant Elmon Middleton pleaded guilty to one count of storing explosive materias, in violation of 18 U.S.C. 842(j). See Tr. 23-34, 42-50, 486.

imprisonment on Count 1 and ten years' imprisonment on Count 2. Execution of the sentence on Count 2 was suspended and a five-year period of probation, to commence upon petitioner's release from federal custody, was imposed (Tr. 487-488). The court of appeals affirmed (Pet. App. 3a-7a).

The evidence established that on the morning of October 18, 1972, Truman Hayes, Regional Manager of the Blasting Materials Division of Phillips Petroleum Corporation, discovered that locks on powder magazines in Kentucky, had been tampered with (Tr. 116). Believing that the perpetrators would return that evening, Hayes and a watchman secreted themselves in a trailer near the magazines. At approximately 10 p.m., they saw three men approach the area, which was illuminated by a mercury vapor lamp.

The Kentucky State Police were summoned, and the watchman left to direct them. Meanwhile, after moving to a position behind a truck for better visibility, Hayes called for the three to surrender as they passed into a lighted area in front of him and about six to eight feet away. Gunfire was exchanged; James Eugene Brock was wounded and captured, but the other two men escaped (Tr. 119-135).

At trial, Hayes positively identified petitioner as one of the three individuals he saw at the powder magazines (Tr. 123-124, 176). Although he had once been an acquaintance of petitioner, the watchman was unable to identify any of the men he saw that night. He did testify, however, that one of the men was similar in size to petitioner (Tr. 76, 88-89).

1. Petitioner contends that the fifteen-month delay between the commission of the offenses on October 18, 1972, and the return of the indictment on January 29, 1974, prejudiced his ability to defend himself and violated the Due Process Clause of the Fifth Amendment.[2] Even if this claim is now available to petitioner in light of his failure to raise it by motion before trial or at trial, it is without merit.

The Due Process Clause of the Fifth Amendment comes into play in pre-indictment delay cases and requires dismissal of the indictment only "if it [is] shown * * * that the pre-indictment delay in [the] case caused substantial prejudice to [the accused's] rights to a fair trial *and* that the delay was an intentional device to gain tactical advantage over the accused." *United States* v. *Marion, supra,* 404 U.S. at 324 (emphasis supplied). See also *United States* v. *Giacalone,* 477 F.2d 1273, 1276-1277 (C.A. 6). Thus "[w]hile the Speedy Trial Clause addresses damage to the defense and other apprehensions as well, the concern of the Due Process Clause is erosion of the accused's capability to muster his response to the charges" (*United States* v. *Parish,* 468 F.2d 1129, 1133 (C.A.D.C.)), and its invocation "clearly requires a showing of actual prejudice." *United States* v. *McClure,* 473 F.2d 81, 82 (C.A.D.C.).

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[2]Petitioner does not base his claim on the Sixth Amendment's speedy trial guarantee. His reliance on the *Ross* line of cases (*Ross* v. *United States,* 349 F.2d 210 (C.A.D.C.)) (Pet. 7-8, 12-13), is misplaced; for that "unique line of cases" in the District of Columbia Circuit is based on the court of appeals' "purported supervisory jurisdiction" and not on the Constitution. *United States* v. *Marion,* 404 U.S. 307, 317, n. 8.

Here, petitioner has failed to show actual prejudice to his defense or to his rights to a fair trial, and he has not pointed to any specific way in which the lapse of time between offense and indictment precluded him from "muster[ing] his response to the charges" against him. Indeed, petitioner's assertion that the delay prevented him from preserving "his memory and [that of] those around him on the night in question" (Pet. 11) rings hollow in the light of the trial transcript which, as the court of appeals noted (Pet. App. 5a), "reveals that [petitioner] paraded no fewer than six alibi witnesses" who testified that they were with petitioner in his residence on the night of the crime.[3] Petitioner was convicted because the jury did not believe his alibi witnesses, not because of prejudice resulting from pre-indictment delay.

Nor has petitioner demonstrated any intentional delay or bad faith on the part of the government in order to gain a tactical advantage—the second essential requisite to relief under the Due Process Clause. See *United States* v. *Marion, supra*, 404 U.S. at 324; *United States* v. *Brown*, 511 F.2d 920, 922-923 (C.A. 2).

2. Petitioner also claims that the district court erred in refusing to permit him to bring out on cross-examination that government agents, who had the authority to arrest on probable cause without a warrant, failed to arrest him until fifteen months after he was identified. Purportedly, this would show the agents' lack of belief in petitioner's guilt and be relevant in the jurors' assessment of his guilt (Pet. 13).

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[3]Perhaps it is because of these alibi witnesses that petitioner failed to file a pre-trial motion to dismiss and discovered that he was "prejudiced" by the delay only when the jury rejected the testimony of his alibi witnesses and found him guilty.

A trial judge has broad discretion, however, in limiting cross-examination, and the court of appeals (Pet. App. 6a-7a) properly ruled that the district judge had not here abused his discretion in excluding such testimony. Even assuming that the agents' delay in arresting petitioner reflected a belief that he was innocent—a dubious assumption at best—that belief would hardly have been of critical significance for the jury in determining petitioner's guilt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.